

STATE OF MICHIGAN
IN THE SUPREME COURT

MARCIA VAN TIL,

Plaintiff-Appellant,

v

ENVIRONMENTAL RESOURCES
MANAGEMENTS, INC.,

Defendant-Appellee,

Supreme Court Docket No. 128283

Court of Appeals Docket No. 250539

Ottawa County Circuit Court

Docket No. 02-042717-NO

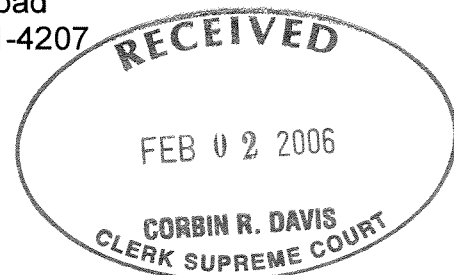
BRIEF ON APPEAL OF AMICUS CURIAE
MICHIGAN TRIAL LAWYERS ASSOCIATION (MTLA)

and

PROOF OF SERVICE

Dated: February 2, 2006

Steven A. Hicks (P49966)
SINAS, DRAMIS, BRAKE,
BOUGHTON & McINTYRE, P.C.
Attorneys for Amicus Curiae
Michigan Trial Lawyers Association
3380 Pine Tree Road
Lansing, MI 48911-4207
(517) 394-7500



STATE OF MICHIGAN
IN THE SUPREME COURT

MARCIA VAN TIL,

Plaintiff-Appellant,

v

ENVIRONMENTAL RESOURCES
MANAGEMENTS, INC.,

Defendant-Appellee,

Supreme Court Docket No. 128283

Court of Appeals Docket No. 250539

Ottawa County Circuit Court

Docket No. 02-042717-NO

BRIEF ON APPEAL OF AMICUS CURIAE
MICHIGAN TRIAL LAWYERS ASSOCIATION (MTLA)

Steven A. Hicks (P49966)
SINAS, DRAMIS, BRAKE,
BOUGHTON & McINTYRE, P.C.
Attorneys for Amicus Curiae
Michigan Trial Lawyers Association
3380 Pine Tree Road
Lansing, MI 48911-4207
(517) 394-7500

Dated: February 2, 2006



SINAS, DRAMIS,
BRAKE, BOUGHTON
& McINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

TABLE OF CONTENTS	Page
INDEX OF AUTHORITIES	iii
CONCURRING STATEMENT AS TO JURISDICTION	iv
STATEMENT OF QUESTIONS RAISED BY THIS COURT AS TO JURISDICTION IN GRANTING LEAVE TO APPEAL	v
CONCURRING STATEMENT OF FACTS	1
INTRODUCTION	2
ARGUMENT	5
I. THE CIRCUIT COURT HAS JURISDICTION TO RESOLVE ALL QUESTIONS RELEVANT TO WHETHER A PLAINTIFF IS BARRED UNDER THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION STATUTE FROM PURSUING A NEGLIGENCE CAUSE OF ACTION AGAINST HIS EMPLOYER.	5
II. FINDING THE WORKERS' COMPENSATION SYSTEM HAS EXCLUSIVE JURISDICTION OVER "ALL QUESTIONS ARISING UNDER THIS ACT" MAY HAVE UNINTENDED CONSEQUENCES ON NEGLIGENCE LAW BECAUSE IT MAY ALSO DIVEST THE CIRCUIT COURT OF JURISDICTION TO RESOLVE QUESTIONS AS TO VICARIOUS LIABILITY, THUS DENYING PLAINTIFFS THE RIGHT TO A JURY TRIAL ON QUESTIONS OF EMPLOYER RESPONSIBILITY FOR AN INDIVIDUAL DEFENDANT'S ACTIONS IN COMMITTING THE TORT	9
CONCLUSION AND RELIEF REQUESTED	14



SINAS, DRAMIS,
BRAKE, BOUGHTON
& MCINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

INDEX OF AUTHORITIES

Page

Cases

<i>Backus v Fajnor-Strong</i> , 238 Mich App 402 (1999)	12
<i>Harris v Venier</i> , 242 Mich App 306 (2000)	11
<i>Helmic v Paine</i> , 369 Mich 114 (1963)	5
<i>Hoste v Shanty Creek</i> , 459 Mich 561 (1999)	12
<i>Janik v Ford Motor Co.</i> , 180 Mich 557 (1914)	12
<i>Reed v Yackell</i> , 473 Mich 520 (2005)	2, 3, 8, 11
<i>Sewell v Clearing Machine Corp.</i> , 419 Mich 56 (1984)	2, 5, 7, 8, 9, 11, 14
<i>Specht v Citizens Insurance Co.</i> , 234 Mich App 292 (1999)	7, 11
<i>State Farm v Roe</i> , 234 Mich App 292 (1997)	11
<i>Szydlowski v General Motors Corp</i> , 397 Mich 356	7, 8, 9
<i>Winters v Dalton</i> , 207 Mich App 76 (1994)	11

Statutes

MCL 418.301	5
MCL 418.841	5, 8
MCL 600.101, et seq.	4

Other Authority

Black's Law Dictionary, 7 th Edition	13
---	----



SINAS, DRAMIS,
BRAKE, BOUGHTON
& MCINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

CONCURRING STATEMENT AS TO JURISDICTION

Amicus curiae Michigan Trial Lawyers Association (MTLA) accepts the Statement as to Jurisdiction as set forth in Plaintiff-Appellant's Brief on Appeal.



SINAS, DRAMIS,
BRAKE, BOUGHTON
& MCINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

**STATEMENT OF QUESTIONS RAISED BY THIS COURT
AS TO JURISDICTION IN GRANTING LEAVE TO APPEAL**

- I. WHETHER THE TRIAL COURT HAS JURISDICTION TO DETERMINE WHETHER PLAINTIFF WAS AN EMPLOYEE, OR WHETHER THAT QUESTION MUST FIRST BE RESOLVED IN THE WORKERS' COMPENSATION ADJUDICATORY SYSTEM?

The Trial Court answered: Yes.

The Court of Appeals answered: Yes.

Plaintiff-Appellant, Marcia Van Til, answers: Yes.

Defendant-Appellee Environmental
Resources Management, Inc., answers: Yes.

Amicus Curiae Michigan Trial Lawyers
Association (MTLA) answers: Yes.

Amicus Curiae Workers' Compensation Law
Section of the State Bar of Michigan answers: No.



SINAS, DRAMIS,
BRAKE, BOUGHTON
& MCINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

CONCURRING STATEMENT OF FACTS

Amicus curiae Michigan Trial Lawyers Association (MTLA) accepts the Statement of Facts set forth in Plaintiff-Appellant's Brief on Appeal.



SINAS, DRAMIS,
BRAKE, BOUGHTON
& McINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

INTRODUCTION

This Court has asked the parties, and certain interested groups named in the order granting leave to appeal, to address whether the trial court had jurisdiction to determine whether plaintiff was an employee, or whether that question must first be resolved in the workers' compensation adjudicatory system. In so doing, this Court referred the litigants to Justice Corrigan's concurring opinion in *Reed v Yackell*, 473 Mich 520, 542 (2005), which first discussed the jurisdictional question raised by this Court in its current leave order by stating that "[i]t appears that the Workers' Compensation Bureau (WCB) has exclusive jurisdiction over consideration of plaintiff's employment status." *Id.*

To support that view, Justice Corrigan contended in her concurring opinion in *Reed* that this Court's previous ruling in *Sewell v Clearing Machine Corp*, 419 Mich 56 (1984), holding that the WCB and the circuit court share jurisdiction to determine employee status, was wrongly decided. In *Reed*, Justice Corrigan concluded that *Sewell* violated the plain language of the workers' compensation statute as to its jurisdiction, overruled longstanding authority that had correctly implemented the statute, and contradicted the legislative scheme established to determine disputes involving the award of workers' compensation benefits. Accordingly, she called for *Sewell* to be overturned. *Reed*, at p 542.

Even more significantly, Justice Corrigan stated that it was her belief that the notion of concurrent jurisdiction affirmed in *Sewell*, was illegitimate, and probably unconstitutional, when she said the following:

We should review the fundamental question of our jurisdiction as it affects not only the proper exercise of judicial authority in this case, but in the myriad cases involving the exclusive remedy provision. I believe that the parallel universe that *Sewell* created is illegitimate. It offends the separation of powers and should be ended." *Id.*



SINAS, DRAMIS,
BRAKE, BOUGHTON
& MCINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

For that reason, Justice Corrigan viewed the jurisdictional question at issue in *Reed* as being of “major jurisprudential significance.” *Id.*, p 543. MTLA agrees on that point only.

The majority in *Reed*, however, acknowledged Justice Corrigan’s strong views on the jurisdictional question, but nonetheless, found that there was subject-matter jurisdiction in that case for the circuit court to resolve the question of the plaintiff’s employment status, and whether he was barred from bringing a negligence lawsuit against defendants under the workers’ comp exclusive remedy provisions. Further, the majority in *Reed* was hesitant to address the issues raised by the Workers’ Compensation Law Section in its *amicus curiae* brief in *Reed* as they had not been raised below, or addressed by the parties, except at the Court’s request at oral argument, without any briefing by the parties as to jurisdiction.

Procedurally, the case at bar is no different than *Reed* with the exception that the jurisdictional question has now been briefed by the parties and other interested groups. While additional briefing certainly informs the Court of presumably all (or nearly all) the arguments to be made, for and against, maintaining the circuit court’s jurisdiction to decide employee status in a tort action where the exclusive remedy defense has been raised, the simple fact is that the Supreme Court in *Reed*, despite its reluctance in light of the strong position taken by Justice Corrigan on the subject of jurisdiction, got it right when they adhered to the rule that the circuit court has jurisdiction to decide an employee’s status.

Nothing in the additional briefing filed by the Workers’ Compensation Law Section of the State Bar of Michigan has made its position more compelling than it was in *Reed*. In fact, if anything, the parties, and the other interest groups, who have filed *amicus curiae* briefs, have made it abundantly clear that such a ruling would be disastrous for the efficient administration of the court system, because it will simply cause more delay and confusion.



Moreover, Michigan Defense Trial Counsel (MDTC) has persuasively argued that the legal interpretation constructed by the Workers' Compensation Law Section of the State Bar of Michigan is nothing more than a strained construction of the language used in the workers' compensation statute, which completely disregards the authority granted to the circuit courts in the state Constitution and the Revised Judicature Act, §600.101, et seq. Both Plaintiff-Appellant's counsel and Defendant-Appellee's counsel have also made this point.

While MTLA agrees with Justice Corrigan's assessment as to the significance of this Court concluding that the workers' compensation system has exclusive jurisdiction to determine a workers' employment status, MTLA also agrees wholeheartedly with the views of the actual parties to this litigation as to the circuit court's jurisdiction, as well as the views expressed by our brother counsel, the defense trial lawyers bar, as stated by the MDTC.

MTLA shares the MDTC's concerns about the "unnecessary procedural complexity" that would result from stopping the negligence case in the circuit court pending resolution of questions as to employment status in the workers' compensation system. MTLA concurs with the MDTC that such a bifurcated procedure "would disrupt the efficient administration of justice in the courts", thus causing undue delay. MTLA also fears that such delay may also result in confusion as to application of the statute of limitations.

MTLA is also concerned that rejecting concurrent jurisdiction in this case may at some juncture have broad, unintended consequences for the well-established common-law doctrine of *respondeat superior* in the State of Michigan. MTLA anticipates that such unforeseen consequences may ultimately extend to all cases where the question in the negligence case is similar, but not identical, to questions arising in workers' compensation.



Thus, MTLA respectfully disagrees with Justice Corrigan's favored resolution in this case, which includes overruling *Sewell* as to the notion of concurrent jurisdiction, and thereby, mandating that the workers' compensation system have exclusive jurisdiction over all questions as to "employee status", including presumably ones not at issue in this appeal.

This *amicus curiae* brief will address only this last concern as the litigants and the MDTC have persuasively demonstrated that the proposed limits on the circuit court's jurisdiction have no basis in the common-law, our state's statutes, or the state Constitution.

ARGUMENT

I. THE CIRCUIT COURT HAS JURISDICTION TO RESOLVE ALL QUESTIONS RELEVANT TO WHETHER A PLAINTIFF IS BARRED UNDER THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION STATUTE FROM PURSUING A NEGLIGENCE CAUSE OF ACTION AGAINST HIS EMPLOYER.

MCL 418.841 provides that "[a]ny dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or workers' compensation magistrate, as applicable." [Emphasis added]. To be eligible for workers' compensation benefits, a claimant must establish the following: 1) the existence of an employer-employee relationship; and 2) an injury arising out of and in the course of the covered employment. MCL 418.301; *Helmic v Paine*, 369 Mich114 (1963). MCL 418.301 sets forth these requirements where it states:

(1) An employee, who receives a personal injury *arising out of and in the course of employment by an employer who is subject to this act* at the time of the injury, shall be paid compensation as provided in this act. [Emphasis added].

However, the workers' compensation statute further provides that "[t]he right to the recovery of benefits as provided in this act shall be the employee's *exclusive remedy*



SINAS, DRAMIS,
BRAKE, BOUGHTON
& MCINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

against the employer for a personal injury or occupational disease. [Emphasis added]. As such, if an employee is entitled to workers' compensation disability benefits, barring an exception to the general rule, he or she cannot bring a tort action against the employer.

In this case, the key issue is whether Plaintiff, Marcia Van Til, was an employee of Defendant, Environmental Resources Management, Inc. (ERM), when she was injured. The circuit court ultimately found that Ms. Van Til was an employee of ERM, and thus, she was not entitled to bring a lawsuit against them. The Court of Appeals affirmed the trial court's ruling. This Court seeks to determine first whether the circuit court or the workers' compensation system should have decided Ms. Van Til's employment status with ERM.

Significantly, the secondary issue, whether Ms. Van Til sustained injury "arising out of and in the course of" stripping and removing wax from the floors at ERM, is not disputed. Thus, the sole question here is whether she was employed by ERM when she did this job. As such, the key issue in this case seems at first blush to be a proper one to resolve in the workers' compensation system, because the dispute in the case at bar asks only if Plaintiff is employed for purposes of recovering workers' compensation benefits, and if so, she is clearly barred from bringing a negligence lawsuit against her employer, Defendant ERM.

Referring this dispute to the workers' compensation system for resolution, however, clearly violates the authority of the circuit court to determine their own jurisdiction under the common law as well as the broad jurisdiction granted to them by the state Constitution, and by the Legislature's refusal to limit the circuit court's jurisdiction. It further would have broad, far-reaching consequences for both the civil justice system and the right to jury trial.

The appeal brief filed by the MDTC as well as the litigants in this case makes these most salient points effectively. For brevity's sake, MTLA simply adopts their arguments as



SINAS, DRAMIS,
BRAKE, BOUGHTON
& MCINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

to the circuit court's jurisdiction over cases with similar facts, e.g. where the dispute concerns only whether the injured person is an employee entitled to recover workers' compensation benefits, and thus, the employee is barred from suing the employer under a negligence theory because of the workers' compensation exclusive remedy provisions.

In addition, MTLA argues that the reasoning underlying Justice Corrigan's favored resolution for such disputes as to employee status, as supported by the Workers' Compensation Law Section of the State Bar of Michigan, would likely have unintended consequences if adopted, because "all questions arising under this act" presumably also includes deciding whether an injury "arose out of and in the course of" the employment. Thus, if a new rule is adopted in this case, the circuit court may at some point also be forced to abdicate its right to determine not only "employee status" but also the question of whether the employee's injury "arose out of and in the course of" the employment. Again, MTLA is concerned that such an outcome in this case will eventually lead to jury trials being denied in other similar contexts in favor of resolution in workers' compensation.

Presumably, other groups interested in this case, such as the Workers' Compensation Law Section, will claim that the issue of whether the plaintiff's injury "arises out of and in the course of" the employment is already well-established to be one where the bureau has sole jurisdiction. *Szydlowski v General Motors Corp*, 397 Mich 356, 359; see also *Specht v Citizens Ins Co*, 234 Mich App 292 (1999). Admittedly, the Supreme Court in *Sewell* suggested as much when it clarified the *Sydlowski* ruling by stating that the circuit court's jurisdiction does not extend to the "arising out of" question, but only to the "more fundamental" issue of whether the plaintiff is defendant's employee." *Sewell*, p 63.



MTLA contends, however, that both issues are fundamental to determining whether an employee is entitled to recover workers' compensation benefits, and thus, both are fundamental to the question of whether the workers' compensation exclusive remedy provisions bar the plaintiff's tort claim against the defendant employer.

In *Sewell*, only the first question as to employee status was on the table, because there was not dispute as to the "arising out of" element. As such, the Supreme Court's statement that the "more fundamental" issue of "arising out of" must be resolved by the workers' compensation system is merely dicta. (See Justice Levin's concurring opinion in *Reed*, p 70). In actuality, the circuit court has jurisdiction in a negligence case to resolve both questions so as to determine whether the affirmative defense argued by the employer in the negligence action, e.g. exclusive remedy is workers' compensation, precludes the plaintiff from bringing the tort claim he or she has filed in circuit court against the employer.

To the extent that this Court's prior holding in *Szydlowski* suggests otherwise, the Court, as Justice Levin points out in his concurring opinion in *Sewell*, was addressing more than was at issue in the case at hand, e.g. *Szydlowski*, and consequently, the often cited rule taken from *Szydlowski* that the workers' compensation bureau has exclusive jurisdiction to decide the "arising out of" question is merely dicta that need not be followed. *Szydlowski*, contrary to Justice Corrigan's position, is not controlling as to either question, because as Justice Levin noted, it "involved a claim based on an affirmative duty imposed by the workers' compensation act" – one which went to compensation – and as consequence, it was rightly referred to the workers' compensation adjudicatory system, because it was a question "arising under this act" as to compensation. MCL 418.841.



SINAS, DRAMIS,
BRAKE, BOUGHTON
& MCINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

Thus, even if *Sewell* is somehow disregarded by this Court, or even overturned, *Szydlowski* still does not inform its decision, because factually it is simply not on point.

II. FINDING THE WORKERS' COMPENSATION SYSTEM HAS EXCLUSIVE JURISDICTION OVER "ALL QUESTIONS ARISING UNDER THIS ACT" MAY HAVE UNINTENDED CONSEQUENCES ON NEGLIGENCE LAW BECAUSE IT MAY ALSO DIVEST THE CIRCUIT COURT OF JURISDICTION TO RESOLVE QUESTIONS AS TO VICARIOUS LIABILITY, THUS DENYING PLAINTIFFS THE RIGHT TO A JURY TRIAL ON QUESTIONS OF EMPLOYER RESPONSIBILITY FOR AN INDIVIDUAL DEFENDANT'S ACTIONS IN COMMITTING THE TORT.

Even more compellingly, there are other also fact scenarios that come to mind which may do additional, and even more serious, harm to the civil justice system in tort actions. Most notably, "employee status" is not relevant only in workers' compensation cases; clearly, it is one of the most basic concepts central to vicarious liability in negligence cases. Thus, the situation where the plaintiff may be entitled to workers' compensation is not the only time such questions may arise in a pending tort action; it is also quite foreseeable that a corporate defendant may disavow any relationship to the individual who commit the tort.

In other words, the question of whether the defendant tortfeasor is actually an employee of the defendant corporation may be brought into question. In such cases, would the circuit court be obligated to refer the dispute to the workers' compensation system for resolution, if the individual defendant made a claim for workers' compensation benefits? If such a claim was made by the individual defendant against his or her co-defendant in the tort action, e.g. the alleged employer, would its resolution in the workers' compensation system be binding for purposes of vicarious liability as a "question arising under this act" as to which the workers' compensation system has exclusive jurisdiction?



SINAS, DRAMIS,
BRAKE, BOUGHTON
& MCINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

Such a result would completely ignore the substantially different analysis employed under the workers' compensation statute to determine if someone is employed for purposes of recovering workers' compensation benefits from the mode of analysis used in making that seemingly identical determination for purposes of vicarious liability against an employer in a negligence action. The analysis of "employee status" in these two areas, while similar, is not exactly the same.

If this Court concludes that the workers' compensation system has exclusive jurisdiction to resolve "all questions arising under this act", presumably the individual defendant's workers' compensation claim must also be decided in the workers' compensation system. In other words, the outcome of the workers' compensation claim may prove to be binding on the litigants in any tort case filed by an injured person against the individual defendant's alleged employer when it comes to determining vicarious liability of the employer for the individual defendant's wrongdoing.

While the other briefs have not addressed this concern, and MTLA is not asking the Court to address it at this moment, because it is not determinative given the facts in the case at bar, MTLA asks this Court to recognize the possible significance of its ruling on jurisdiction as to the employee's status when it comes to who should decide the other fundamental question – "arising out of". Even though the actual dispute in this particular case may seem a proper one for the workers' compensation system to resolve at hearing, such a conclusion should not be determinative of whether the circuit court has jurisdiction.

For those who may claim MTLA is simply crying "wolf" when it comes to the possible preclusive effect of a ruling on the "arising out of" question in the workers' compensation system, MTLA would have them note that this very question was raised in a prior



application for leave to appeal to this Court from the Court of Appeal's ruling in *State Farm v Roe*, 234 Mich App 292, 298 (1997). In *Roe*, the Court of Appeals relied on *Sewell* to affirm a jury verdict for the plaintiff in a tort claim against his employer after the trial court correctly determined that "[p]laintiff's employment relationship was tangentially involved." After trial, the defendant challenged the circuit court's subject-matter jurisdiction. Subsequently, leave was granted by this Court to decide "the issue of whether courts are bound by the bureau's determination concerning whether an employment relationship exists." *Specht*, at p 297, n 2. The parties soon stipulated to dismiss the appeal.

Specht not only makes it clear that MTLA's concerns about who will decide the "arising out of" question are well-founded, it also illustrates the unfairness that will result if the defendant can lay in wait and then challenge subject-matter jurisdiction after the plaintiff obtains a verdict in the circuit court tort case. It is well-established that challenges to subject-matter jurisdiction may be raised at any time and may not be waived by a litigant. *Winters v Dalton*, 207 Mich App 76 (1994); *Harris v Venier*, 242 Mich App 306 (2000).

While this Court in *Reed* offered a solution for the plaintiff that allowed him to pursue a workers' compensation claim, after he lost his tort case under the workers' compensation exclusive remedy provisions, e.g., by treating his filing of the tort case as notice of his workers' compensation claim, it appears that the result in *Reed* was likely based on equitable principles, as no statutory or common-law authority for that solution was provided in the Court's opinion. Given this Court's prior rulings on equitable tolling, future plaintiffs would have every right to be concerned about whether a later adverse determination on subject-matter jurisdiction in the circuit court will leave them with no remedy at all. In the face of that uncertainty, very few injured persons will be likely to pursue a claim in the



SINAS, DRAMIS,
BRAKE, BOUGHTON
& MCINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

circuit court, and instead, will be forced to make only a workers' compensation claim. Concurrent jurisdiction preserves both claims and prejudices neither party to the case.

Simply put, workers' compensation and the common-law doctrine of *respondeat superior*, also known as vicarious liability, have a different history as part of our legal system and vastly different purposes when it comes to the goals behind them. In *Hoste v Shanty Creek*, 459 Mich 561, 567-68 (1999), this Court rejected the "economic reality" test previously applied in workers' compensation in favor of a test adhering simply to the factors set forth in the workers' compensation statute itself, which does not focus on control as a factor as under the prior analysis. See *Hoste*, p 566. Under *respondeat superior*, however, the test remains one of control. *Backus v Fajnor-Strong*, 238 Mich App 402 (1999); *Janik v Ford Motor Co*, 180 Mich 557 (1914).

Intuitively, this distinction makes sense because workers' compensation is a broad act concerning with compensating persons injured in the workplace, and vicarious liability concepts such as the *respondeat superior* doctrine are concerned solely with whether another entity should be held responsible for the individual defendant's actions. Moreover, the vast differences between workers' compensation and vicarious liability are not limited simply to determinations of employees status, these fundamental distinctions also concern whether an employee was acting in the course and/or scope of his or her employment. While these words are commonly used in both contexts, they do not mean the same thing.

Scope of employment is a phrase not used in workers' compensation. Under *respondeat superior*, however, it is essential to determining if there is vicarious liability. Scope of employment refers to the acts the employee is authorized to perform, and thus, its use is largely consistent with the notion an employer must have control over the person



SINAS, DRAMIS,
BRAKE, BOUGHTON
& McINTYRE, PC.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

for them to even be considered an employee in a tort cause of action. See generally, *Black's Law Dictionary*, 7th Edition, p 1348. In contrast, an *ultra vires* act would be an example of something that would not be attributable to the employer, because it goes beyond the scope of the individual's employment with the defendant, even if it occurred within the course of the individual's employment, e.g. it happened on the job. *Id.*, p 1525. Course of employment simply means something that happens on the job. *Id.*, 356.

However, if this Court holds that employee status must be determined by the workers' compensation system, it is logical to presume that the other essential question to determining an employee's entitlement to workers' compensation benefits, e.g. whether the injury "arises out of and in the course of employment" will also be subject to a determination in workers' compensation that may presumably be binding in any tort action. Such a result would contravene the history and purposes behind both the workers' compensation statute and the common-law doctrine of *respondeat superior*, also known as vicarious liability, in negligence cases. Moreover, it would blur the important differences between the distinct tests for establishing liability in tort and workers' compensation.

In some cases, such a result would hurt a plaintiff bringing a negligence lawsuit because of the exclusive remedy provisions. In others, it would benefit a plaintiff trying to sue a defendant employer for the actions of someone alleged to be its employee. In either situation, it would junk the well-established common-law rules for vicarious liability, in favor of a largely inapplicable and dissimilar standard for evaluating employee status in the arena of workers' compensation law. While such a merging of these two distinct tests might create more work for workers' compensation attorneys, it clearly would undermine



SINAS, DRAMIS,
BRAKE, BOUGHTON
& MCINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

the well-established rules of vicarious liability in the negligence context, creating uncertainty, delay, and incongruous results for both plaintiffs and defendant corporations.

CONCLUSION AND RELIEF REQUESTED

As set forth previously, MTLA and its members share the very serious concerns expressed by the MDTC as to the primary issue this Court has requested that the litigants address on appeal, e.g. whether the circuit court has jurisdiction to decide whether a plaintiff is barred by the exclusive remedy provisions of the workers' compensation statute, or whether this question must be resolved in the workers' compensation system. Again, MTLA agrees with the MDTC's position that the circuit court has concurrent jurisdiction with the workers' compensation system to address such questions as to employee status. MTLA is also concerned that the adoption of the position espoused by the Workers' Compensation Law Section of the State Bar of Michigan may have far-reaching, unintended consequences, which may ultimately undermine not only the jurisdiction of the circuit court, as discussed by the MDTC, but also undermine well-established common law concepts of vicarious liability integral to negligence law in the State of Michigan.

WHEREFORE, MTLA requests that this Honorable Court answer the questions it has raised *sua sponte* in granting the application for leave to appeal by affirming that the circuit court has jurisdiction to resolve such questions as to the employee's status and whether the exclusive remedy provisions under workers' compensation bar the tort claim. Further, MTLA respectfully requests that if *Sewell* is overturned, and this Court concludes that such questions as to employee status must be resolved first by the workers' compensation system, this Court also give guidance to the circuit courts, as well as present and future tort litigants, as to how to effectively preserve their claims pending resolution of



SINAS, DRAMIS,
BRAKE, BOUGHTON
& MCINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

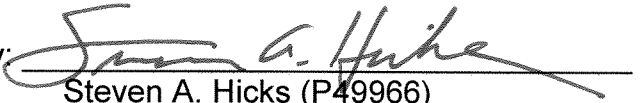
TELEPHONE 517-394-7500
FAX 517-394-7510

"all questions arising under this act" by the workers' compensation system, so that the statute of limitations will not run, and such claims will not be barred on timeliness grounds.

Respectfully submitted,

**SINAS, DRAMIS, BRAKE,
BOUGHTON & McINTYRE, P.C.**
Attorneys for *Amicus Curiae* MTLA

Date: February 2, 2006

By: 
Steven A. Hicks (P49966)
3380 Pine Tree Road
Lansing, MI 48911
(517) 394-7500



SINAS, DRAMIS,
BRAKE, BOUGHTON
& McINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510